

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 11 May 2007**

CASE NO.: 2005-BLA-6014

In the Matter of:

R. S.

Claimant

v.

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS

Respondent

**APPEARANCES:**

Robert J. Bilonick, Esq.  
For the Claimant

Tracy L. Schwab, Esq.  
For the Director, OWCP

Before: DANIEL L. LELAND  
Administrative Law Judge

**DECISION AND ORDER - DENYING BENEFITS**

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held in Pittsburgh, PA on January 9, 2007 at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations found in Title 20 Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. At the hearing, Director's exhibits (DX) 1-86 and claimant's exhibit (CX) 1 were admitted into evidence. The record was

held open for claimant to submit Dr. Miller's interpretation of the August 20, 2005 x-ray which has been admitted as CX 2. The Director, OWCP filed a post-hearing brief.

### ISSUES

- I. Causal relationship of pneumoconiosis and coal mine employment.
- II. Existence of total disability.
- III. Causation of total disability.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW <sup>1</sup>

#### Procedural History

R. S. (claimant or miner) filed the instant claim for benefits on December 19, 2000. (DX 1). The claim was denied on June 11, 2001, December 27, 2001, and June 5, 2002. (DX 23, DX 31, DX 38). Claimant requested a hearing and the case was forwarded to the Office of Administrative Law Judges on July 5, 2002. (DX 40). On December 3, 2002 a hearing was held before Administrative Law Judge Michael P. Lesniak. (DX 58). Judge Lesniak issued a Decision and Order-Denying Benefits on June 30, 2003. (DX 63). Judge Lesniak determined that a preponderance of the x-ray evidence is negative for pneumoconiosis. Id at 13. He found, however, that the opinion of Dr. Schaaf that the miner has pneumoconiosis outweighs the poorly reasoned opinions of Dr. Wodzinski and Dr. Paul and establishes the existence of pneumoconiosis. Id at 14. Although the parties had stipulated to ten years of coal mine employment, Judge Lesniak determined that the miner was off work due to an injury the last three years of his coal mine employment, and that he had only seven years of coal dust exposure and was not entitled to the presumption in § 718.203(b) that his pneumoconiosis arose out of coal mine employment. Id at 14. He found that Dr. Schaaf's opinion is the only opinion linking the miner's coal mine employment to pneumoconiosis and that it is too equivocal and uncertain to establish the required nexus between the two. Id at 15. Judge Lesniak also concluded that the evidence was insufficient to establish that the miner is totally disabled and that he is therefore unable to establish that he is totally disabled due to pneumoconiosis. Id at 16. Claimant appealed this decision to the Benefits Review Board which issued a decision and order on May 27, 2004 upholding Judge Lesniak's finding that the causal relationship between the miner's pneumoconiosis and coal mine employment had not been established. (DX 70). Claimant filed a request for modification on January 6, 2005 which was denied by the district director on March 7, 2005. (DX 71, DX 72). Claimant requested a hearing and the case was referred to OALJ on June 16, 2005. (DX 74).

#### Background

The miner was born on March 30, 1932 and his only dependent is his wife. (DX 1). He was employed as a coal miner from 1956 to April 1963. (DX 2, DX 5). His last job was a shuttle

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<sup>1</sup> The following abbreviations have been used in this opinion: DX=Director's exhibit, CX=claimant's exhibit, EX=employer's exhibit, TR=transcript of hearing, BCR=board certified radiologist, B=B reader.

car operator and the most difficult part of the job was unloading roof bolts and bags of rock dust. See transcript of December 3, 2002 hearing at 11. Before he was a coal miner, claimant was a pottery worker for six years. Id at 15-16. See DX 2. He smoked cigarettes for about six years at the approximate rate of one half pack a day. Id at 17.

### Medical Evidence

The following is a summary of the relevant medical evidence submitted since the issuance of Judge Lesniak's decision and order. The summary of medical evidence therein is hereby incorporated by reference.

#### Pulmonary Function Studies

<u>Exhibit</u>	<u>Date</u>	<u>Height</u>	<u>Age</u>	<u>FEV1</u>	<u>FVC</u>	<u>MVV</u>	<u>FEV1/FVC</u>
DX 80	10/28/05	68 in.	73	2.49	3.43	----	73%
				2.28*	3.14*	----	73%*

\*post bronchodilator

#### Blood Gas Studies

<u>Exhibit</u>	<u>Date</u>	<u>PCO2</u>	<u>PO2</u>
DX 78	10/28/05	43.2	86.3

#### Medical Reports

Dr. Schaaf submitted a report dated December 15, 2004. (DX 71). He stated that the miner has pneumoconiosis based on chest x-rays that demonstrate pneumoconiosis and a compatible environmental history. Dr. Schaaf also stated that coal dust is the cause of the miner's pneumoconiosis based on a history of coal mine employment for seven or ten years. He was unable to determine whether the miner's employment in a pottery factory for six or ten years contributed to his pneumoconiosis. Dr. Schaaf maintained that the miner's coal workers' pneumoconiosis is a substantial contributing factor to his disability as it was causing his hypoxemia.

Dr. Jay Paul examined claimant on October 28, 2005. (DX 77). He credited the miner with a coal mine employment from 1955 to 1966 and found that he had stopped smoking cigarettes ten years ago after smoking one to two cigarettes a day for an undetermined period of time. In the pulmonary examination, the miner's lungs were clear to auscultation and percussion. The ventilatory studies indicated a mild obstructive impairment and the resting blood gas test demonstrated no desaturation or significant CO2 retention. Dr. Paul diagnosed chronic airways obstruction and chronic bronchitis and stated that the etiology of these conditions was "cigarette smoking vs. asthma". See also DX 82. Dr. Paul assessed a mild pulmonary impairment and stated that the miner's chronic airways obstruction and chronic bronchitis were "totally causative". (DX 77, DX 82).

Dr. Schaaf was deposed on May 26, 2006. (CX 1). Dr. Schaaf examined the miner on November 16, 2000 and October 13, 2005. Id at 15. Dr. Schaaf testified that claimant worked in a pottery factory for four years and was an underground coal miner from 1954 to 1966. Id at 17. The principal finding of the second physical examination was a heart murmur. Id at 18. The chest x-ray was positive for pneumoconiosis. Id at 21. Dr. Schaaf concluded that the miner's coal dust exposure was causing his pneumoconiosis and that the overwhelming preponderance of the miner's dust exposure was in coal mine employment, because he had to change his clothes after a day's work in the mines but did not change clothes after returning from work in the pottery factory. Id at 22. The miner had an insignificant cigarette smoking history of two to three cigarettes a day for fifteen years and he quit smoking in his 30s. Id at 23-24. The pulmonary function studies showed mild restrictive and moderate obstructive disease which Dr. Schaaf attributed to coal workers' pneumoconiosis. Id at 26, 28. The pCO<sub>2</sub> in the miner's blood gas test was "a little high". Id at 29. The miner's pulmonary impairment is sufficient to preclude him from performing his last coal mine work. Id at 30.

### Conclusions of Law

A claimant may request modification of a denial of a claim within one year of the denial based on a change in conditions or a mistake of fact. § 725.310. A modification petition need not specify any factual error or change in conditions and indeed, the claimant may merely allege that the ultimate fact—total disability due to pneumoconiosis—was wrongly decided.

*Consolidation Coal Co. v. Director, OWCP [Worrell]*, 27 F. 3d 227 (6th Cir. 1994). See also *Jessee v. Director, OWCP*, 5 F3d 723 (4<sup>th</sup> Cir. 1993).

Benefits are provided to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. § 718.204(a). Claimant has the burden of proving by a preponderance of the evidence that he has pneumoconiosis arising out of coal mine employment and that he is totally disabled as a result. *Gee v. W. G. Moore & Sons, Inc.*, 9 BLR 1-4 (1986). In order for a claimant to be eligible for benefits, it must be determined that his pneumoconiosis arose at least in part out of coal mine employment. § 718.203(a). If a miner who has pneumoconiosis has less than ten years of coal mine employment, there must be competent medical evidence that the pneumoconiosis arose out of coal mine employment. § 718.203(c).

Judge Lesniak determined that Dr. Schaaf's opinion on the etiology of the miner's pneumoconiosis was too equivocal and uncertain to establish a relationship between his coal mine employment and pneumoconiosis. I completely agree with this finding as Dr. Schaaf originally stated that he could not determine whether the miner's exposure in the pottery factory or his exposure to coal dust was causing his pneumoconiosis. See DX 12. In his recent deposition testimony, Dr. Schaaf stated unequivocally that the miner's coal dust exposure is the cause of his pneumoconiosis. However, his opinion is poorly reasoned and based on incorrect employment information. Dr. Schaaf credited the miner with twelve years of coal mine employment and four years of work in the pottery factory although claimant actually worked in the coal mines for a little over seven years and was employed in the pottery factory for six years.<sup>2</sup> Moreover, Dr. Schaaf relied on the fact that the miner changed his work clothes after a

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<sup>2</sup> In his December 15, 2004 report, Dr. Schaaf stated that the miner had "7 or 10 years" of work in the coal mines and "6 or 10 years" of work in the pottery factory, but his opinion that the miner's coal dust caused his

day at work in the mines but did not change clothes after a day at work in the pottery factory. There is no substantiation in the record for claimant's changing clothes after coal mine work but not after work in the pottery factory and even if this is correct it is not the kind of "competent medical evidence" required by the regulations. It is significant that Dr. Paul, who believed that claimant had eleven years of coal mine employment, felt that his pulmonary impairment is due to cigarette smoking or asthma. As claimant was employed as a coal miner only one year more than his employment in the pottery factory and both jobs exposed him to dust, I find that the evidence is insufficient to support a conclusion that his pneumoconiosis was caused by coal dust.

A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and gainful work. § 718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability shall be established by pulmonary function studies showing the values equal to or less than those in Appendix B, blood gas studies showing the values in Appendix C, the existence of cor pulmonale with right sided congestive heart failure, or the reasoned and documented opinion of a physician finding that the miner's pulmonary or respiratory impairment prevents him from engaging in his usual coal mine work and comparable and gainful work. § 718.204(b)(2).

None of the pulmonary function studies or blood gas tests in the record is qualifying and there is no evidence that the miner has cor pulmonale. Judge Lesniak correctly noted that in Dr. Schaaf's report he did not attribute the miner's disability to his pulmonary condition, and that in his deposition testimony he did not fully explain on what basis he concluded that the miner is incapable, from a pulmonary standpoint, of performing his usual coal mine work. See DX 12, DX 59 at 20. Dr. Schaaf's more recent opinion is also poorly reasoned. See *Fields v. Island Creek Coal Co*, 10 BLR 1-19 (1987). In his report of December 15, 2004 he stated that the miner's "coal worker's pneumoconiosis is a substantial contributing factor in his disability" but never actually determined that the miner has a totally disabling pulmonary impairment. In his deposition testimony Dr. Schaaf responded to the question; "Doctor, is the pulmonary impairment in this case sufficient to preclude his last coal mining work as you understand it?" "I believe that it is." As in his prior deposition testimony, Dr. Schaaf never provided any reasons for his finding that the miner is totally disabled from a pulmonary standpoint and therefore his opinion can not be credited. *Fields*. Dr. Paul assessed only a mild pulmonary impairment and did not conclude that it is totally disabling. I therefore conclude that the evidence does not establish the miner's total disability and that he is not totally disabled due to pneumoconiosis.

The evidence of record does not demonstrate that the miner's pneumoconiosis arose out of his coal mine employment or that he is totally disabled due to pneumoconiosis. There has not been a mistake of fact or change in conditions warranting a different result than that reached by Judge Lesniak. The request for modification is therefore denied.

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pneumoconiosis was because his "coal mine employment places him at risk for coal workers' pneumoconiosis and his dust exposure as described is sufficient to cause coal workers' pneumoconiosis." Dr. Schaaf did not provide an accurate employment history in his report nor did he provide any reasons for finding that the miner's coal dust exposure caused his pneumoconiosis.

As the claim has been denied, claimant's counsel is precluded from receiving a fee for his legal work on this case.

ORDER

IT IS ORDERED THAT the claim of R. S. is DENIED.

**A**

DANIEL L. LELAND  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).